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No. 08-271

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER, and DONALD HYATT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

BRIEF IN OPPOSITION

WILLIAM P. GAVIN
GAVIN LAW FIRM
17 Park Place Professional Centre
Belleville, Illinois 62226
(618) 236-0100

Counsel for Respondents

218485

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REASONS FOR DENYING THE PETITION

I. *AYERS* ANSWERED THE QUESTION PETITIONER PRESENTS

Petitioner's Petition For A Writ of Certiorari in essence requests this Court to limit the recovery of damages for genuine and serious fear of cancer in Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, asbestosis suits to those instances wherein the fear manifests itself in the claimant by physical disabilities that are confirmed by objective evidence. In doing so, Petitioner presents the same question that this Court answered in *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 157, 155 L. Ed. 2d 261, 281, 123 S. Ct. 1210, 1223 (2003): Whether an FELA Plaintiff, who has been diagnosed with asbestosis, but not cancer, may recover damages for fear of cancer without physical manifestation of the claimed emotional distress.

The *Ayers* decision clearly answered the question presented by Petitioner and stated, "Our answer is yes, with one important reservation. . . . It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious." *Ayers*, 538 U.S. at 157. In the trial below, the trial court faithfully followed this ruling by instructing the jury that if Respondents met their burden of proof, the jury could compensate Respondents for "The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future." Pet. App. 63a.

The *Ayers* decision was consonant with American common law summarized in The Restatement (Second) of Torts § 456 Comment c, cited in *Ayers*, 538 U.S. at

148-49. *See, also, Ayers*, 538 U.S. at 149-51 nn.8-10. Petitioner requests this Court to roll back its *Ayers* decision by grafting a restrictive definition onto "genuine and serious." The definition sought by Petitioner would be nothing more than a requirement that there be physical manifestations of the fear of cancer, proved by objective evidence, before the claimant may recover for this element of the claimant's damages. The *Ayers* decision clearly established that physical manifestations are not required and no purpose would be served by granting Petitioner's Petition For A Writ Of Certiorari.

Petitioner erroneously asserts that in prior decisions, this Court has held that "damages for emotional distress are recoverable only where the emotional injury complained of is serious and supported by more than complainant's subjective testimony." Petition at 11. Petitioner relies on this Court's decisions in *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113 (1997) for its erroneous application of this broad proposition to the instant action.

While the Court's decisions in *Buell*, *Gottshall*, and *Buckley* concerned recovery for emotional distress under the FELA, none of these decisions held that to establish sufficient evidence of emotional distress damages in an FELA asbestosis action, objective evidence of the emotional distress must be introduced. *Buell* addressed the issue of "whether the possibility of

pursuing a labor grievance under the RLA (Railway Labor Act) deprives an employee of his right to bring an FELA action." *Buell*, 480 U.S. at 559. The *Gottshall* Court decided the issue of whether a claim may be stated under the FELA for negligent infliction of emotional distress and, if so, under what circumstances may such a claim be stated. *Gottshall*, 512 U.S. at 542. *Buckley* presented the issue of whether employees negligently exposed to asbestos, but not diagnosed with asbestos illness, fit within the parameters established in *Gottshall*. *Buckley*, 512 U.S. at 426-27. It was *Ayers* that answered the question Petitioner again presents and no purpose would be served in re-visiting what has already been decided.

Petitioner has not cited any authority to show that any court, federal or state, has held that an instruction must be given to limit "genuine and serious" as Justice BREYER limited that term in his *Ayers* dissenting opinion. *Ayers*, 538 U.S. at 187. To the contrary, two courts, in addition to the Appellate Court of Illinois in this action, have held that such an instruction is not warranted. *Hensley v. CSX Transp., Inc.*, 2008 WL 683755, *16 (Tenn. Ct. App. 2008) and *Hedgecorth v. Union Pacific R.R. Co.*, 210 S.W. 3d 220, 227 (E. D. Mo. 2007), *cert. denied* 128 S.Ct. 59, 169 L.Ed.2d 15 (2007). *See, also, Jones v. CSX Transp.*, 337 F.3d. 1316, 1317 (11th. Cir. 2003) wherein the Eleventh Circuit Court of Appeals, following *Ayers*, reversed the district court's ruling that there must be objective manifestation of emotional distress before there can be a recovery for fear of cancer.

II. The Limitation Sought By Petitioner Is Both Unnecessary And Inconsistent With The Purpose Of The FELA

Petitioner asserts that a restrictive definition of "genuine and serious" is necessary to create uniformity in the application of the FELA. Such an argument, however, wrongfully pre-supposes that the common words "genuine and serious" cannot be understood by those courts applying the *Ayers* decision. To graft the restrictive definition advocated by Petitioner onto the plain meaning of "genuine and serious" would unnecessarily restrict a lower court's ability to apply the *Ayers* principle to the unique facts that are presented to it with each new case.

Trial courts and finders of fact are as capable of determining whether the claimed emotional distress is genuine and serious as they are capable of determining whether a claimant has experienced physical pain and/or disability because of physical injuries. *Cf. Buckley*, 521 U.S. 424 at 452, (GINSBURG, J., concurring in part and dissenting in part; "Fact finders in tort cases routinely face questions lacking indubitably clear answers . . . ."). The subjective elements of physical pain and suffering and disability are not restrictively defined and no purpose would be well served by further defining the genuine and serious fear of cancer.

Petitioner also erroneously asserts that if narrow limits are not imposed on the right to recover damages for the genuine and serious fear of cancer, the American railroad industry will be faced with limitless liability that will destroy its ability to compensate those employees

who actually develop cancer because of exposure to asbestos during their employment. This prophesy of dire financial burden assumes that the universe of potential FELA fear of cancer claimants is limitless. To the contrary, the universe is first limited by the application and operation of the FELA and, within the resulting group, further limited by this Court's decisions in *Buckley* and *Ayers* to those claimants who have been diagnosed with asbestosis and whose emotional distress is genuine and serious. *See, Gottshall*, 512 U.S. 559-60, 570-71 and 572 (GINSBURG, J., dissenting).

Petitioner cites no authority for any railroad's projected inability to compensate those suffering from mesothelioma as a result of the railroad's violation of the FELA. The information cited by Petitioner in its Petition about the impact of asbestos disease litigation clearly concerns the impact on sellers and manufacturers of asbestos products and demonstrates nothing about the impact of FELA asbestos litigation on railroads. Petition at 16-17. Petitioner fails to show that the proposed limitation on the recovery for genuine and serious fear of cancer is necessary to preserve the assets of American railroads for future claimants afflicted with asbestos cancer.

The proposed limitation on the recovery of damages for genuine and serious fear of cancer would also be inconsistent with the Congressional intent of the FELA. This court has noted that Congress in enacting the FELA did not intend a "static remedy, but one which would be developed and enlarged. . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958). This Court has also noted that it

applies a liberal construction to the FELA in order to achieve its humanitarian purpose. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) and *Buell*, 480 U.S. at 562.

The limitation on genuine and serious fear of cancer damages advocated by Petitioner would all but eliminate recovery for the mental anguish FELA asbestosis victims experience over their increased risk of future cancer. It is undeniable that one afflicted with asbestosis is at an increased risk of various cancers because of the asbestos exposure and/or asbestosis.[1] It is also undeniable that the prospect of future cancer can cause emotional distress because cancer is "unusually threatening and unusually frightening." *Buckley*, 521 U.S. at 435. However, it is also true that human nature is such that the emotional distress may not physically manifest itself, in all cases, to the degree Petitioner claims is necessary for a recovery. The narrowing of the FELA remedy sought by Petitioner would be incompatible with the remedial purpose of the FELA because it would artificially foreclose that class of physically injured employees who have experienced genuine and serious emotional distress from recovering damages only because their distress has not manifested itself by physical disability.

1. Respondents' uncontested evidence at trial established this fact.

III. The Trial Court Properly Instructed The Jury On The Genuine And Serious Fear Of Cancer Damages Element

Petitioner claims that the form of the jury instructions given by the trial court was improper. The format of jury instructions in an FELA case is a procedural matter for the state to regulate. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 274, 775 N.E.2d 964, 973, 266 Ill. Dec. 892, 901 (Ill. 2002). *See, also, Hedgecorth v. Union Pacific R.R. Co.*, 210 S.W.3d 220, 227 (E. D. Mo. 2007) *cert. denied* 128 S.Ct. 59, 169 L.Ed.2d 15 (2007). Illinois Supreme Court Rule 239 requires the use of Illinois Pattern Jury Instructions unless the court determines that a pattern instruction does not accurately state the law.

The jury instructions tendered by Petitioner that would have restrictively defined "genuine and serious fear of cancer", were properly refused because they were procedurally defective. Thus, the instructions would have been refused even if they had properly stated the substantive law.

Petitioner's Instruction Number 4 contained the term "must demonstrate." Pet. App. 64a. Respondents properly objected to this tendered instruction because the term "must demonstrate" is vague, argumentative and would have placed a higher burden of proof on Respondents than that imposed by Illinois Pattern Jury Instruction 21.01 (2006). Illinois Pattern Jury Instruction 21.01 does not contain the term "must demonstrate" and the trial court correctly sustained

this objection noting that to inject the term, "must demonstrate", into the pattern jury instructions would, at best, have been confusing. For this procedural reason alone the trial court properly refused Petitioner's Instruction Number 4.

The trial court also properly refused Petitioner's Instruction Number 5A because it is duplicative of the damages and burden of proof instructions. Respondents' Instructions No. 31B, 32A, 33B (the damages instructions), and No. 36 (the burden of proof instruction) clearly set forth that before any Respondent recovered for an element of damages, he was required to meet his burden of proof that he had experienced that element of damages. Pet. App. 63a. Petitioner's Instruction Number 5A would have improperly highlighted one element of the damages sought. The trial court correctly recognized that to repeat one element of damages outside the series of pattern instructions on damages found at Illinois Pattern Jury Instructions 30.01 *et seq.* would have put improper emphasis on the element of damages. *See, Podoba v. Pyramid Elec., Inc.*, 281 Ill. App.3d 545, 667 NE.2d 167, 172, 217 Ill. Dec. 374 (5th Dist. 1996) (Trial court committed reversible error when it gave a non-Illinois Pattern Jury Instruction that gave undue emphasis to an element of damages).

Petitioner urges this Court to find that the trial court's damages instructions were erroneous because the inclusion of the term "The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future" strongly suggested that a professed fear of cancer was "*ipso facto* genuine and

serious." Petition at 13. This is the first time Petitioner has raised this objection to the trial court's damages jury instructions. No such objection to the instructions was made at trial and, therefore, the Illinois Appellate Court did not consider this argument. This Court has often refused to consider issues that were not adequately addressed and developed by lower courts and it should not do so in this action *E.g.*, *Buell*, 480 U.S. at 570-71.

The damages jury instructions were constructed from Illinois Pattern Jury Instructions Nos. 30.01, .04, .04.01, .04.02, .05, and .06. The instructions began with the phrase, "If you decide . . . ." This phrase is defined in Illinois Pattern Jury Instruction 21.01 which states, "When I say . . . 'if you decide,' I mean you must be persuaded, considering all the evidence in the case, that the proposition on which [the party] has the burden of proof is more probably true than not true." Illinois Pattern Jury Instruction 21.01 (2006). Each damages instruction ended with the admonishment "Whether any of these elements of damages has been proved by the evidence is for you to decide." Pet. App. 63a. Clearly, the form of the damages instructions made it clear that each Respondent carried the burden of proving each element of his claimed damages, including the genuine and serious fear of cancer.

IV. Respondents Introduced Sufficient Evidence For An Instruction On The Genuine And Serious Fear Of Cancer

The Petition For A Writ Of Certiorari should be denied because in it Petitioner does nothing more than request this Court to re-weigh the evidence introduced at trial. In doing so, Petitioner misrepresents the record below by not fully presenting the evidence introduced by Respondents at trial concerning the fear of cancer. On the fear of cancer subject, Respondents testified as follows:

Mr. Copple testified that he was concerned about his lungs and the prospects of cancer as a result of his asbestosis and that he had consulted about his concern with his physician, Dr. Carlos Ezpeleta. He had periodic appointments with Dr. Ezpeleta for monitoring his condition. Mr. Copple testified that he had learned of the various diseases associated with asbestos by reading about the subject following Dr. Alvin Schonfeld's examination and before trial. Mr. Copple testified, "I'm concerned about it. I'm even worried about it .... I do think about it a lot."

Mr. Heinrichsmeyer testified that Dr. Schonfeld advised him to keep track of Mr. Heinrichsmeyer's diagnosed asbestosis and, as a result, he has routinely visited his doctors since Dr. Schonfeld's examination. Mr. Heinrichsmeyer testified that he has provided Dr. Schonfeld's report to his personal physicians. Mr. Heinrichsmeyer testified that he is concerned about his future as a result of his asbestosis and the prospect of cancer and that he is also concerned about the security of his family.

Mr. Hyatt testified that after Dr. Schonfeld's examination of him, Dr. Schonfeld talked to him about asbestos and cancer and told Mr. Hyatt that he "should get checked." Mr. Hyatt testified that he discussed the issue of future cancer with his personal physician, Dr. Collins, and was told that he would get an annual chest x-ray and that they would "keep a handle on it." My Hyatt also testified that getting cancer has been on his mind all of the time. He explained that when he developed chest symptoms in 2006 his first thought was that it was cancer until the symptoms were later diagnosed by Dr. Collins as resulting from pneumonia.

Dr. Douglas Pohl, a pathologist, testified in detail as to what cancers are caused by asbestos exposure. Dr. Schonfeld gave similar testimony. Dr. Pohl further testified that it would be medically reasonable for each Respondent to be concerned about his prospects of developing an asbestos-related cancer in the future.

Dr. Schonfeld and Dr. Pohl testified about the type of future medical care that would be required to monitor Respondents' asbestosis and increased risks of cancer. Specifically, Dr. Schonfeld testified that each Respondent would require periodic x-rays, medical examinations and keeping current on colonoscopies. Dr. Pohl gave similar testimony.

The above evidence is substantially similar to that presented in *Hensley v. CSX Transp., Inc.*, 2008 WL 683755, *16-17 (Tenn. Ct. App. 2008). In *Hensley*, the Appellate Court noted that the Plaintiff testified about his concern about future cancer and that he was taking Xanax prescribed by his doctor. The *Hensley*

court ruled that this evidence exceeded that introduced in *Seaford v. Norfolk S. Ry.*, 159 Ohio App.3d 374, 824 N.E.2d 94 (Ohio Ct. App. 2004), *rev'd. on other grounds*, 106 Ohio St.3d 430, 835 N.E.2d 717 (Ohio 2005) and found that sufficient evidence had been introduced to support submission of the fear of cancer element of damages to the jury. The Illinois Appellate Court's decision in this action is consistent with the *Hensley* decision.

Petitioner portrays the *Seaford* decision as evidence that some division exists in the lower courts over how to define and/or apply the term "genuine and serious." *Seaford* represents nothing more than one court's application of the *Ayers* standard to the evidence uniquely before it. In *Seaford*, the only evidence of fear of future cancer was the Plaintiff's testimony, "I worry about it and the family is concerned about it." *Seaford*, 824 N.E.2d at 111. As noted above, Respondents each introduced substantially more evidence. *See, Buckley*, 521 U.S. at 445 (GINSBURG, J., dissenting and suggesting that seeking professional help, as Respondents did in this case, is some evidence of severe emotional injury).

At trial, Petitioner consented to instructing the jury that if Respondents sustained their burden of proving damages for the fear of cancer, they could be compensated for this loss. During the preliminary conference on instructions, Petitioner's counsel agreed that the damages instructions should include the element of fear of cancer. Petitioner's counsel stated, "I don't have a problem with you using fear of cancer. Yes. That's right." Petitioner's assertion in this Court that insufficient evidence was introduced at trial for

submission of the fear of cancer damages element to the jury is inconsistent with its agreement at trial that the jury be instructed on this element of damages.

CONCLUSION

For the reasons stated above, Respondents, Delbert Copple, Carl Heinrichsmeyer, and Donald Hyatt, pray that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted,

WILLIAM P. GAVIN
GAVIN LAW FIRM
17 Park Place Professional Centre
Belleville, Illinois 62226
(618) 236-0100

Counsel for Respondents